

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI**

ASARCO LLC, a Delaware corporation,

Plaintiff,

v.

NL INDUSTRIES, INC., et al.,

Defendants.

Case No. 4:11-cv-00864-JAR

**PLAINTIFF ASARCO LLC'S STATEMENT OF DISPUTED MATERIAL FACTS  
IN OPPOSITION TO UNION PACIFIC'S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Fed. R. Civ. P. 56 and Local Rule 4.01, ASARCO LLC (“Asarco”) hereby submits its Statement of Disputed Material Facts in Opposition to Defendant Union Pacific Railroad Company’s (“Union Pacific”) Motion for Summary Judgment (“Motion,” Doc. 220).

Asarco asserts all facts contained in the Opposition and the Appendix of Exhibits, both of which are filed simultaneously herewith. Asarco also specifically disputes any contrary assertions in the Union Pacific’s Statement of Uncontroverted Material Facts (“UP’s SUMF”) (Doc. 221), Motion and Memorandum in Support (Doc. 220).

**Asarco’s Response to Union Pacific’s Statement of Undisputed Facts**

**I. STATUTE OF LIMITATIONS.**

**A. ASARCO’S BANKRUPTCY SETTLEMENT AGREEMENT REGARDING SEMO**

1. On August 9, 2005, Asarco filed for Chapter 11 bankruptcy in United States Bankruptcy Court, Southern District of Texas, Corpus Christi Division, Cause No. 05-21207 (the “Bankruptcy”). Asarco 2d Am. Compl. at ¶ 12 (Doc.78).

**Response:** Undisputed.

2. On February 8, 2008, Asarco signed a Settlement Agreement Regarding the Southeast Missouri (“SEMO”) Sites (the “SEMO Settlement”). Ex. 2 (Bankr. Doc.7070-2).

**Response:** Undisputed.

3. The SEMO Settlement provided that “in settlement and satisfaction of all claims and causes of action of the United States and the State with respect to any and all costs of response incurred, or to be incurred, in connection with the SEMO sites” Asarco agreed to pay \$37,500,000, allocated as follows: (a) \$17,072,427 Big River Mine Tailings/St. Joe Minerals, (b) \$7,743,418 Federal Mine Tailing, and (c) \$12,684,155 Madison County Mines Site. Ex. 2, SEMO Settlement, at pp. 3-4.

**Response:** ASARCO specifically disputes the statement because, *inter alia*, the settlement described therein provided that “the United States on behalf of EPA shall have an allowed general unsecured claim in the total amount of \$37,500,000” of which \$17,072,427 was allocated to the Big River Mine Tailings / St. Joe Minerals Corp. Site, \$7,743,418 was allocated to the Federal Mine Tailings Site, and \$12,684,155 was allocated to the Madison County Mines Site (each site as defined therein). Ex. 2 to UP’s SUMF at 3 (Doc. 221-2 at 4). Under the Confirmed Plan, allowed general unsecured claims were paid in full with interest, so the United States on behalf of EPA actually received more than the amounts stated in the settlement. Asarco Incorporated and Americas Mining Corporation’s Seventh Amended Plan of Reorganization at 8 (Doc. 12728-1 at 16) (August 2009) (attached as “Exhibit A”); Deposition of J. Christopher Pfahl at 88:8-12 (March 2014) (attached as “Exhibit B”).

4. The SEMO Settlement further provided that “in settlement and satisfaction of all claims and causes of action . . . for joint federal-state natural resource damages and costs” Asarco agrees to pay \$34,676,000, allocated as follows: (a) \$28,267,000, Big River Mine Tailings/St. Joe Minerals/Federal Mine Tailings, (b) \$1,500,000, Madison County Mines Site, (c) \$1,000,000, West Fork Mine, (d) \$2,000,000, Sweetwater Mine, and (e) \$2,000,000, Glover Smelter. Ex. 2, SEMO Settlement, at pp. 4-5.

**Response:** ASARCO specifically disputes the statement because, *inter alia*, the settlement described therein provided that “the United States on behalf of DOI and the State on behalf of the Director, Missouri Department of Natural Resources shall have a joint, indivisible allowed general unsecured claim for natural resource damages in the total amount of in the total amount of \$34,767,000” of which \$28,267,000 was allocated to the Big River Mine Tailings / St. Joe Minerals Corp. Site / Federal Mine Tailings Site, \$1,500,000 was allocated to the Madison

County Mines Site, \$1,000,000 was allocated to the West Fork Mine / Mill Property, \$2,000,000 was allocated to the Sweetwater Mine / Mill Property, and \$2,000,000 was allocated to the Glover Smelter property (each site as defined therein). Ex. 2 to UP's SUMF at 4 (Doc. 221-2 at 5). Under the Confirmed Plan, allowed general unsecured claims were paid in full with interest, so the United States on behalf of EPA actually received more than the amounts stated in the settlement. Exhibit A at 8; Exhibit B at 88:8-12.

5. On February 15, 2008, the United States signed the SEMO Settlement. Ex. 2, SEMO Settlement, at pp. 4-5, p. 16.

**Response:** Undisputed.

6. On March 3, 2008, Asarco filed its Motion for Order Approving Settlement Agreement between Asarco and the U.S. Regarding the SEMO Sites. 2d Am. Compl. at ¶ 13 (Doc.78); Ex. 3, Mot. for Order Approving Settlement Agreement (Bankr. Doc.7070) ("Motion for Approval").

**Response:** ASARCO specifically disputes the statement because the correct title of the pleading described therein is "Motion For Order Approving Settlement Agreement Among ASARCO LLC, The United States, The State Of Missouri, The Doe Run Company, And DR Land Holdings LLC Regarding The Southeast Missouri (SEMO) Sites." Ex. 3 to UP's SUMF at 1 (Doc. 221-3 at 2).

7. In accordance with Section 122(i) of CERCLA, the United States published notice of the proposed SEMO Settlement and provided the opportunity for public comment in the Federal Register on March 13, 2008. 73 Fed. Reg. 13569 (2008).

**Response:** Undisputed.

8. On May 12, 2008, a hearing was held on Asarco's Motion for Approval and the parties to the SEMO Settlement provided testimony and proffers in support of the Settlement Agreement. Ex. 4, Hr'g Tr. (Bankr. Doc.7748) (entered May 16, 2008).

**Response:** ASARCO specifically disputes the statement that "parties to the SEMO Settlement provided testimony and proffers in support of the Settlement Agreement" because, *inter alia*, the proffers were not made by ASARCO and because such testimony was confined to stating that the proffers were true and correct to the best of each such witness's knowledge. *See generally*, Ex. 4 to UP's SUMF.

9. On May 12, 2008, the Bankruptcy Court signed an Order Approving Settlement Agreement After Public Comment for the Southeast Missouri (SEMO) Sites. 2d Am. Compl. at ¶ 14; Ex. 5, Order Approving Settlement (Bankr. Doc.7674).

**Response:** Undisputed.

10. In approving the SEMO Settlement, the Bankruptcy Court stated that "it further appear[s] that the relief requested in the Motion is in the best interests of the Debtor and its estate and creditors. . . ." Ex. 5, Order Approving Settlement (Bankr. Doc. 7674.)

**Response:** Undisputed.

#### **B. THE INSTANT ACTION IS UNTIMELY**

11. On May 12, 2011, Asarco filed its original Complaint in the U.S. District Court for the Eastern District of Missouri and asserted CERCLA contribution claims against various defendants. Compl. at ¶ 1 (Doc.1 ). Burlington Northern Santa Fe Railway Company ("BNSF") was named as a defendant; Union Pacific was not. *See* Compl. at ¶¶ 5-10 (Doc. 1).

**Response:** ASARCO specifically disputes the statement in paragraph 11 of the UP Statement that “Union Pacific was not [named as a defendant]” because Does 1-50 were named as defendants. Compl. at ¶ 1 (Doc.1 at 1).

12. On September 14, 2011, Asarco filed its First Amended Complaint in the U.S. District Court for the Eastern District of Missouri, asserting a CERCLA contribution claim against Union Pacific. 1st Am. Compl. (Doc. 9).

**Response:** Undisputed.

13. On October 5, 2011, Asarco served a summons and Asarco’s First Amended Complaint on Union Pacific. 1st Am. Compl. and Summons (Docs. 9, 45).

**Response:** Undisputed.

14. More than three years transpired between the date that the Bankruptcy Court judicially approved the SEMO Settlement on May 12, 2009, and the date that Asarco sued Union Pacific, on September 14, 2011. Compare Ex. 5, Order Approving Settlement (Bankr. Doc. 7674), *with* 1st Am. Compl. (Doc. 9).

**Response:** Disputed to the extent Union Pacific implies Asarco was not timely in filing its contribution claim against Union Pacific. *See generally*, Declaration of Gregory Evans (“Evans Decl.”). Asarco’s claim was timely given Asarco’s statute of limitations on its CERCLA contribution claim did not commence until December 9, 2009, and even if it were to have commenced at an earlier date, Asarco’s claim is still timely given the application of either and/or all of the relation back, equitable tolling and judicial estoppel doctrines.

15. In response to Union Pacific’s Motion to Dismiss Party or, in the Alternative, for More Definite Statement (Doc. 51), Asarco filed its Second Amended Complaint

and alleged a single contribution claim against Union Pacific on February 9, 2012. 2d Am. Compl. at 8-10 (Doc.78).

**Response:** Disputed to the extent Union Pacific implies Asarco was not timely in filing its contribution claim against Union Pacific. *See generally*, Evans Decl.

**C. UNION PACIFIC HAD NO PRIOR NOTICE THAT ASARCO INTENDED TO NAME IT AS A PARTY IN THE ORIGINAL COMPLAINT.**

16. Asarco did not include in its initial mandatory disclosure schedule of assets and liabilities, or in any subsequent disclosures in the Bankruptcy, any claims against Union Pacific at SEMO. Ex. 6, Asarco's Schedules of Assets and Liabilities at Schedule F-6 (Bankr. Doc. 878).

**Response:** ASARCO specifically disputes Union Pacific's statement that ASARCO "did not include in its initial mandatory disclosure schedule of assets and liabilities, or in any subsequent disclosures in the Bankruptcy, any claims against Union Pacific at SEMO" because the statement reflects conclusions of law, not statements of fact, and is incorrect. ASARCO also specifically disputes the statement because Schedule H ("Codebtors") expressly includes "Non-Governmental Entities listed in the Environmental Claims in Exhibit F-6 to Schedule F," (United States Bankruptcy Court, Summary of Schedules at 60 (November 2005) (attached as "Exhibit C")) and UP is listed on Exhibit F-6 to Schedule F (Ex. 6 to UP's SUMF at 146 (Bankr. Doc. 878 at 16)).

17. In its confirmed Seventh Amended Plan of Reorganization (the "Plan"), Asarco did not identify or retain any contribution claims against Union Pacific regarding SEMO. Ex. 7, Asarco Confirmed Plan of Reorganization at p. 25 § 10.13 (Bankr. Doc. 12728-10); *see* also Ex. 8, Plan Exhibit 9, Schedule of Litigation Trust Claims at p. (Bankr. Doc. 12728-10)

(identifying some potentially responsible parties for certain SEMO sub-sites, without naming Union Pacific).

**Response:** ASARCO specifically disputes Union Pacific's statement that ASARCO "did not identify or retain any contribution claims against Union Pacific regarding SEMO" in its Plan because the statement reflects conclusions of law, not statements of fact, and is incorrect. Further disputed to the extent Union Pacific implies any such alleged lack of identification means Asarco did not retain contribution claims against Union Pacific at the SEMO site. Ex. 8 to UP's SUMF at 3 (Bankr. Doc. 12728-10 at 5).

18. Nor has any regulatory authority ever named Union Pacific as a PRP at the SEMO sites. Ex. 9, Grimaila Dep., at 37:20-24, 100:4-7, 199:3-6 (Nov. 7, 2013).

**Response:** Disputed to the extent Union Pacific's statement implies they are not a PRP at the SEMO sites. Further disputed to the extent it implies Union Pacific cannot be named as a PRP in the future.

**D. ASARCO HAD KNOWLEDGE SUFFICIENT TO ADD UNION PACIFIC AS A PARTY BEFORE THE STATUTE OF LIMITATIONS RAN ON MAY 12, 2012**

19. Asarco has represented that it is "obvious and well-known that Union Pacific owns or has owned many miles of land in, across and near the SEMO Sites . . ." Asarco Resp. to Union Pacific Mot. to Dismiss at p. 3 (Doc. 57).

**Response:** Disputed to the extent Union Pacific implies Asarco was aware Union Pacific owns or has owned many miles of land in, across and near the SEMO site, and that Asarco had sufficient time to add Union Pacific as a party to the action, any time before the statute of limitations allegedly ran. Exhibit B at 73:2-13; Evans Decl. ¶ 4.

20. Christopher Pfahl, Asarco's corporate witness designated pursuant to Federal Rule of Civil Procedure 30(b)(6), testified that Asarco based its conclusions regarding

Union Pacific's alleged CERCLA liability at SEMO in part on a report by Newfields, an environmental consulting firm. Ex. 10, Rule 30(b)(6) Dep. of Asarco by John Christopher Pfahl at 65:20-67:2 (Mar. 19, 2014).

**Response:** ASARCO specifically disputes Union Pacific's statement that Asarco "based its conclusions regarding Union Pacific's alleged CERCLA liability at SEMO in part on a report by Newfields" to the extent it implies Asarco was aware of Union Pacific's liability at the SEMO site upon review of the NewFields report. Mr. Pfahl specifically states the NewFields report did not attribute railroads to any specific owner. Exhibit B at 98:10-14 and 101:5-9.

21. The draft Newfields report, titled "Historic Railroads St. Francois County Mined Areas, St. Francois County, Missouri" (the "Newfields Report") was dated January 29, 2007. Ex. 11, Newfields Report.

**Response:** Undisputed.

22. Although the Newfields Report does not mention Union Pacific as a railroad company active in the SEMO area, the Newfields Report references railroads that Asarco's corporate witness asserts were "acquired by Union Pacific." Ex. 10, Pfahl Dep., at 98:10-99:10.

**Response:** Disputed to the extent Union Pacific implies Asarco became aware of Union Pacific's liability at the SEMO site, or that Asarco had sufficient time to add Union Pacific as a party to the action, any time before the statute of limitations allegedly ran. Further disputed to the extent that the statement implies that Asarco knew that the railroads were "acquired by Union Pacific" before the statute of limitations ran. The NewFields report did not attribute railroads to any specific owner. Exhibit B at 98:10-14 and 101:5-9; *see generally*, Ex. 11; Evans Decl. ¶ 4, 5, 8-11.

23. The Newfields Report predated Asarco's entry into the SEMO Settlement. Ex. 10, Pfahl Dep., at 101:18-25.

**Response:** Disputed to the extent Union Pacific implies the NewFields report identified, or made Asarco aware of, Union Pacific's liability at the SEMO site, or that Asarco had sufficient time to add Union Pacific as a party to the action, any time before the statute of limitations allegedly ran. *See generally*, Ex. 11; Evans Decl. ¶ 4, 5, 8-11.

24. Asarco had possession of the 2007 Newfields Report at the time it filed the original Complaint on May 12, 2011. Ex. 10, Pfahl Dep., at 135:4-8.

**Response:** Disputed to the extent Union Pacific implies the NewFields report identified, or made Asarco aware of, Union Pacific's liability at the SEMO site, or that Asarco had sufficient time to add Union Pacific as a party to the action, any time before the statute of limitations allegedly ran. Exhibit B at 101:5-9; *see generally*, Ex. 11; Evans Decl. ¶ 4, 5, 8-11.

25. Mr. Pfahl agreed in his deposition that it was "not any great revelation that there was railroad hauling of mining materials" in the SEMO site area. Ex. 10, Pfahl Dep., at 104:1-4.

**Response:** Disputed to the extent Union Pacific implies Mr. Pfahl was aware of Union Pacific's liability at the SEMO site, or that Asarco had sufficient time to add Union Pacific as a party to the action, any time before the statute of limitations allegedly ran. Exhibit B at 73:2-13; *see generally*, Ex. 11; Evans Decl. ¶ 4, 5, 8-11.

26. At the time it filed the original Complaint on May 12, 2011, and for "a good while" before that, Asarco claims it had a general understanding of the potential contribution of railroad activity to environmental conditions at SEMO. Ex. 10, Pfahl Dep., at 136:4-14.

**Response:** Disputed to the extent Union Pacific implies Asarco was aware of Union Pacific's liability at the SEMO site, or that Asarco had sufficient time to add Union Pacific as a party to the action, any time before the statute of limitations allegedly ran. Evans Decl. ¶ 4, 5, 8-11.

27. Mr. Pfahl also testified that "[o]ver the years" he had "reviewed numbers of documents relating to railroads at various sites where [he] was manager around the United States and the potential liabilities that the railroads might have at those various sites, not specifically the SEMO site." Ex. 10, Pfahl Dep., at 68:1-6. These documents specifically involved Union Pacific. Ex. 10, Pfahl Dep., at 68:7-9.

**Response:** Disputed to the extent Union Pacific implies Mr. Pfahl was aware of Union Pacific's liability at the SEMO site, or that Asarco had sufficient time to add Union Pacific as a party to the action, any time before the statute of limitations allegedly ran. Evans Decl. ¶ 4, 5, 8-11. Mr. Pfahl is not knowledgeable of historic rail line operations at the SEMO site. Exhibit B at 83:10-13. Additionally, Mr. Pfahl only became aware of Union Pacific's liability at the SEMO site upon notification of this action. Exhibit B at 73:2-13.

28. Mr. Pfahl testified that "how railroad beds were built and materials that they were built out of" can affect environmental conditions at a site, and, in this respect "SEMO" no different than, say, Coeur d'Alene Basin" in Idaho. Ex. 10, Pfahl Dep., at 68:14-17.

**Response:** Disputed to the extent Union Pacific implies Mr. Pfahl was aware of Union Pacific's liability at the SEMO site, and that Asarco had sufficient time to add Union Pacific as a party to the action, any time before the statute of limitations allegedly ran. Evans Decl. ¶ 4, 5, 8-11. Disputed to the extent Union Pacific implies Asarco's previous experiences at

the Coeur d'Alene Basin put Asarco on notice of Union Pacific's liability at the SEMO site. Further disputed to the extent Union Pacific implies Union Pacific's railroad beds at Coeur d'Alene Basin were built of the same materials at SEMO. Exhibit B at 70:17-20.

29. Mr. Pfahl testified that Asarco's experiences with contesting liability in the Coeur d'Alene Basin influenced Asarco's conclusion that Union Pacific had liability at SEMO because "portions" of the rail lines through the Coeur d'Alene Basin "were constructed with mine waste and tailings, similar . . . to SEMO." Ex. 10, Pfahl Dep., at 69:8-17.

**Response:** Disputed to the extent Union Pacific implies Mr. Pfahl or Asarco was aware of Union Pacific's liability at the SEMO site, and that Asarco had sufficient time to add Union Pacific as a party to the action, any time before the statute of limitations allegedly ran. Evans Decl. ¶ 4, 5, 8-11. Disputed to the extent Union Pacific implies Asarco's previous experiences at the Coeur d'Alene Basin put Asarco on notice of Union Pacific's liability at the SEMO site. Further disputed to the extent Union Pacific implies Union Pacific's railroad beds at Coeur d'Alene Basin were built of the same materials at SEMO. Exhibit B at 70:17-20.

30. Another Asarco witness, Donald A. Robbins, Asarco's former director of environmental services, testified that Asarco had "knowledge that mining material had been used as ballast" in the construction of railroad rights-of-way. Ex. 12, Robbins Dep., at 96:1- 13, Apr. 18, 2014. Asarco had learned this based on its experience at sites in East Helena, Montana, and in the Coeur d'Alene Basin. Ex. 12, Robbins Dep., at 96:15-17. Asarco knew this information "before the SEMO Settlement." Ex. 12, Robbins Dep., at 96:22-24.

**Response:** Disputed to the extent Union Pacific implies Mr. Robbins or Asarco was aware of Union Pacific's liability at the SEMO site, and that Asarco had sufficient time to add Union Pacific as a party to the action, any time before the statute of limitations allegedly ran.

Evans Decl. ¶ 4, 5, 8-11. Further disputed to the extent Union Pacific implies Asarco's previous experiences at East Helena or the Coeur d'Alene Basin put Asarco on notice of Union Pacific's liability at the SEMO site. Further disputed to the extent Union Pacific implies Union Pacific's railroad beds at Coeur d'Alene Basin were built of the same materials at SEMO. Exhibit B at 70:17-20.

31. Asarco had possessed information since the "early [19]90s" indicating that railroad rights-of-way could release contaminants and create CERCLA liability. Ex. 12, Robbins Dep., at 43:22-45:2, 46:15-22.

**Response:** Disputed to the extent Union Pacific implies Asarco was aware of Union Pacific's liability at the SEMO site, and that Asarco had sufficient time to add Union Pacific as a party to the action, any time before the statute of limitations allegedly ran. Evans Decl. ¶ 4, 5, 8-11. Further disputed to the extent Union Pacific implies Asarco had sufficient opportunity to locate all potentially responsible parties at the SEMO site before the statute of limitations allegedly ran.

32. Asarco began investigating the potential liability of third parties at the SEMO site "beginning in 2011 . . ." Ex.10, Pfahl Dep., at 125:24-126:6.

**Response:** Disputed to the extent Union Pacific implies Asarco had sufficient opportunity to locate all potentially responsible parties in the timeframe between when Asarco began investigating the potential liability of third parties and the time Asarco filed its Complaint. Evans Decl. ¶ 4-11.

33. By the time Asarco filed the original Complaint on May 12, 2011, Asarco "had enough information to believe that railroads owned and operated in the area could have potential liability for the SEMO sites." Ex. 10, Pfahl Dep., at 132:6-21.

**Response:** Disputed to the extent Union Pacific implies Asarco possessed information sufficient to name Union Pacific as a defendant from which Asarco is entitled to contribution under CERCLA at the SEMO sites at the time Asarco filed its original Complaint. Evans Decl. ¶ 4. Asarco mistakenly named BNSF Railway Company (“BNSF”) in its original Complaint (Doc. 1 at ¶9) without realizing that the successor to nearly all of the railroads that operated in SEMO was in fact Union Pacific (Doc. 214 at 13-22). Further disputed to the extent Union Pacific implies Asarco had sufficient opportunity to locate all potentially responsible parties at the SEMO site before the statute of limitations allegedly ran.

34. However, at the time it filed the original Complaint, Asarco did “no work” to identify precisely which historic or currently operating railroads allegedly contributed to environmental conditions at the SEMO site. Ex. 10, Pfahl Dep., at 133:2-13.

**Response:** Disputed to the extent the statement implies Asarco did nothing to determine which railroads have liability at the SEMO site. Exhibit B at 126:2-6. Identification of potentially responsible parties was “being handled by Greg Evans and...the general counsel.” Exhibit B at 133:2-7.

35. Asarco named BNSF as a defendant in the original Complaint (Doc. 1 at ¶ 9), but shortly thereafter dismissed BNSF with prejudice and removed it from the First Amended Complaint. PL’s Notice of Dismissal With Prejudice as to Def. BNSF Ry.Co. (Doc. 63).

**Response:** Undisputed to the extent that Asarco had mistakenly named BNSF as a defendant in the original Complaint without realizing that the successor to nearly all of the railroads that operated in SEMO was in fact Union Pacific. Doc. 214 at 13-22.

36. Asarco's corporate witness could not explain why the original Complaint named BNSF as a party, but did not name Union Pacific. Ex. 10, Pfahl Dep., at 123:25-124:1, 137:1-6.

**Response:** Disputed to the extent Union Pacific implies Asarco's corporate witness was unprepared to provide deposition testimony. Identification of potentially responsible parties was "being handled by Greg Evans and...the general counsel." Exhibit B at 133:2-7.

37. Mr. Pfahl could not identify any information or documents developed between the filing of the original Complaint on May 12, 2011 and the First Amended Complaint on September 14, 2011, that led Asarco to add Union Pacific as a defendant. Ex. 10, Pfahl Dep. at 141:18-142:10.

**Response:** Disputed to the extent Union Pacific implies Asarco's corporate witness was unprepared to provide deposition testimony. Identification of potentially responsible parties was "being handled by Greg Evans and...the general counsel." Exhibit B at 133:2-7.

**2. ASARCO HAS NO EVIDENCE TO SUPPORT CLAIMS AGAINST UNION PACIFIC RELATING TO THE WEST FORK MINE, SWEETWATER MINE AND GLOVER SMELTER SUB-SITES.**

38. SEMO is comprised of five sub-sites: (a) Madison County/Catherine Mine; (b) Big River/Federal Mine Tailings (St. Francois County); (c) West Fork Mine; (d) Sweetwater Mine; and (e) Glover Smelter. 2d Am. Compl. at ¶ 11 (Doc.78).

**Response:** Undisputed.

39. The West Fork Mine sub-site of SEMO is located in Reynolds County, Missouri. 2d Am. Compl. at ¶ 11(c.).

**Response:** Undisputed.

40. The Sweetwater Mine sub-site of SEMO is located in Reynolds County, Missouri. 2d Am. Compl. at ¶ 11(d).

**Response:** Undisputed.

41. The Glover Smelter sub-site of SEMO is located in Iron County, Missouri.  
2d Am. Compl. at ¶ 11(e).

**Response:** Undisputed.

42. In Plaintiff's March 11, 2014 Status Report on Government Remediation, Asarco states that it "seeks contribution in this case, as allowed by CERCLA and according to a District Court approved settlement agreement, for environmental harm caused by Defendants in two counties in the Southeast Missouri Mining District - Madison and St. Francois." Asarco Status Report at 1 (Doc. 203). Asarco's report made no mention of Reynolds or Iron Counties. Asarco Status Report at 1.

**Response:** Disputed to the extent that Union Pacific deliberately omits that Asarco intended, and in fact offered, to withdraw its claims for sub-sites located in Reynolds or Iron Counties. *See* Exhibits 2 and 3 to Evans Decl.

43. Although the Second Amended Complaint alleged that Union Pacific had liability at each of the five SEMO sub-sites, 2d Am. Compl. ¶ 19 (Doc. 78), Asarco states further that "[t]he two sub-sites at issue in this recovery action are: Madison County and St. Francois County . . ." Asarco Status Report at 9 (Doc. 203).

**Response:** Disputed to the extent that Union Pacific deliberately omits that Asarco intended, and in fact offered, to withdraw its claims for sub-sites located in Reynolds or Iron Counties. *See* Exhibits 2 and 3 to Evans Decl.

44. In its Lone Pine brief, Asarco concedes that of the five sub-sites that comprise SEMO, only two sub-sites, in Madison County and St. Francois County, "are the focus

of the present litigation.” Pl.’s Lone Pine Br. on CERCLA Liability of Union Pacific R.R. Co., at 1, n.1 (Doc. 214).

**Response:** Disputed to the extent that Union Pacific deliberately omits that Asarco intended, and in fact offered, to withdraw its claims for sub-sites located in Reynolds or Iron Counties. *See* Exhibits 2 and 3 to Evans Decl.

45. Union Pacific’s corporate witness, John Hawkins, affirmed that neither Union Pacific nor its corporate predecessors ever owned or operated on any property within 23 miles of the West Fork Mine or Sweetwater Mine, located in Reynolds County, Missouri. Ex. 13, Decl. John Hawkins ¶ 3.

**Response:** Disputed to the extent that Asarco has no information concerning Union Pacific’s liability at those sub-sites since it intended, and in fact offered, to withdraw its claims relating to the Glover Smelter, West Fork and Sweetwater sub-sites, and thus conducted no discovery to the extent it was allowed under the MCMO and has no information as to Union Pacific liability at those sub-sites. *See* Exhibits 2 and 3 to Evans Decl.

46. A search of Union Pacific and publicly available records revealed no evidence that Union Pacific or its predecessors ever owned any property or conducted any operations in Reynolds County. Ex. 13, Hawkins Decl. ¶ 5.

**Response:** Disputed to the extent that Asarco has no information concerning Union Pacific’s liability at those sub-sites since it intended, and in fact offered, to withdraw its claims relating to the Glover Smelter, West Fork and Sweetwater sub-sites, and thus conducted no discovery to the extent it was allowed under the MCMO and has no information as to Union Pacific liability at those sub-sites. *See* Exhibits 2 and 3 to Evans Decl.

47. The West Fork and Sweetwater mine sub-sites are located in the western portion of Reynolds County. The nearest Union Pacific rail line is the DeSoto Subdivision, which runs through Iron and Wayne Counties, which are east of Reynolds County. Ex. 13, Hawkins Decl. ¶ 4.

**Response:** Disputed to the extent that Asarco has no information concerning Union Pacific's liability at those sub-sites since it intended, and in fact offered, to withdraw its claims relating to the Glover Smelter, West Fork and Sweetwater sub-sites, and thus conducted no discovery to the extent it was allowed under the MCMO and has no information as to Union Pacific liability at those sub-sites. *See* Exhibits 2 and 3 to Evans Decl.

48. Review of publications and Interstate Commerce Commission documents relating to the Missouri Southern Railroad Company ("Missouri Southern") show that it was the only railroad that operated in Reynolds County, but it was abandoned and dismantled in 1941. These records further support that there was no historic relationship between the Missouri Southern and Union Pacific. Ex. 13, Hawkins Decl. ¶ 6; Ex. 13A, Interstate Commerce Comm'n Proceedings on Missouri So. R.R. Co. Abandonment, UPRR-001815-1816 (Jan. 10, 1940); Ex. 13B, Interstate Commerce Comm'n Proceedings on Missouri So. R.R. Co. Abandonment, UPRR-000896-900 (Apr. 9, 1941); Ex. 13C, Application of Mo. So. R.R. Co. to Abandon Line from Leeper, Mo., to Dunker, Mo., ASARCOSEM000032104-32129 (Dec. 20, 1940).

**Response:** Disputed to the extent that Asarco has no information concerning Union Pacific's liability at those sub-sites since it intended, and in fact offered, to withdraw its claims relating to the Glover Smelter, West Fork and Sweetwater sub-sites, and thus conducted no discovery to the extent it was allowed under the MCMO and has no information as to Union Pacific liability at those sub-sites. *See* Exhibits 2 and 3 to Evans Decl.

49. Asarco's corporate witness, Mr. Pfahl, admitted that there were no railroads at the West Fork Mine. Ex. 10, Pfahl Dep., at 104:25-105:1, 117:9-10.

**Response:** Disputed to the extent that Asarco has no information concerning Union Pacific's liability at those sub-sites since it intended, and in fact offered, to withdraw its claims relating to the Glover Smelter, West Fork and Sweetwater sub-sites, and thus conducted no discovery to the extent it was allowed under the MCMO and has no information as to Union Pacific liability at those sub-sites. *See Exhibits 2 and 3 to Evans Decl.*

50. Another Asarco witness, Mr. Robbins, testified that he was not aware of any railroads in the area of West Fork or Sweetwater, and all of the ore from the Sweetwater Mine and West Fork Mine was transported to the smelters by truck. Ex. 12, Robbins Dep., at 28:20-29:5.

**Response:** Disputed to the extent that Union Pacific deliberately omits that Asarco intended, and in fact offered, to withdraw its claims for sub-sites located in Reynolds or Iron Counties. *See Exhibits 2 and 3 to Evans Decl.*

51. A search of Union Pacific valuation maps, property records and agreement records revealed that neither Union Pacific nor any of its corporate predecessors ever owned property in the Glover Smelter sub-site. Ex. 13, Hawkins Decl. ¶¶ 3, 7-8.

**Response:** Disputed to the extent that Asarco has no information concerning Union Pacific's liability at those sub-sites since it intended, and in fact offered, to withdraw its claims relating to the Glover Smelter, West Fork and Sweetwater sub-sites, and thus conducted no discovery to the extent it was allowed under the MCMO and has no information as to Union Pacific liability at those sub-sites. *See Exhibits 2 and 3 to Evans Decl.*

52. The nearest Union Pacific line to the Glover Smelter is the DeSoto Subdivision, which is separated from the Glover Smelter by State Highway 49. Ex. 13, Hawkins Decl. ¶ 8.

**Response:** Disputed to the extent that Asarco has no information concerning Union Pacific's liability at those sub-sites since it intended, and in fact offered, to withdraw its claims relating to the Glover Smelter, West Fork and Sweetwater sub-sites, and thus conducted no discovery to the extent it was allowed under the MCMO and has no information as to Union Pacific liability at those sub-sites. *See* Exhibits 2 and 3 to Evans Decl.

53. Union Pacific owns no property in the vicinity of the Glover Smelter west of State Highway 49. Ex. 13, Hawkins Decl. ¶ 8.

**Response:** Disputed to the extent that Asarco has no information concerning Union Pacific's liability at those sub-sites since it intended, and in fact offered, to withdraw its claims relating to the Glover Smelter, West Fork and Sweetwater sub-sites, and thus conducted no discovery to the extent it was allowed under the MCMO and has no information as to Union Pacific liability at those sub-sites. *See* Exhibits 2 and 3 to Evans Decl.

54. The Glover Smelter was constructed in 1968. Ex. 12, Robbins Dep., at 36:8-9.

**Response:** Disputed to the extent that Asarco has no information concerning Union Pacific's liability at those sub-sites since it intended, and in fact offered, to withdraw its claims relating to the Glover Smelter, West Fork and Sweetwater sub-sites, and thus conducted no discovery to the extent it was allowed under the MCMO and has no information as to Union Pacific liability at those sub-sites. *See* Exhibits 2 and 3 to Evans Decl.

55. Pipeline and wire line agreements executed by Asarco in 1971 to enable its utilities to cross Union Pacific's DeSoto Subdivision right-of-way confirm that the Union Pacific right-of-way in the vicinity of the Glover Smelter is 100 feet wide, and that Union Pacific's right-of-way is physically separated from the smelter property by the highway. Ex. 13, Hawkins Decl. ¶ 8; Ex. 13D, Track Map, St. Louis Service Unit, De Soto Subdivision, UPRR-001376 (Rev'd Oct. 2, 2008); Ex. 13E, Wire Line License Between Mo. Pac. R.R. Co. and Am. Smelting and Refining Co., UPRR-000459-467 (Sept. 2, 1971); Ex. 13F, Pipe Line License Between Mo. Pac. R.R. Co. and Am. Smelting and Refining Co., UPRR-000468-476 (Sept. 2, 1971).

**Response:** Disputed to the extent that Asarco has no information concerning Union Pacific's liability at those sub-sites since it intended, and in fact offered, to withdraw its claims relating to the Glover Smelter, West Fork and Sweetwater sub-sites, and thus conducted no discovery to the extent it was allowed under the MCMO and has no information as to Union Pacific liability at those sub-sites. *See* Exhibits 2 and 3 to Evans Decl.

56. Mr. Hawkins' review and evaluation considered both active and abandoned rights-of-way relative to the West Fork, Sweetwater and Glover Smelter sub-sites. There is no record that Union Pacific or any of its corporate predecessors own or ever owned property within these sites. Ex. 13, Hawkins Decl. ¶ 9.

**Response:** Disputed to the extent that Asarco has no information concerning Union Pacific's liability at those sub-sites since it intended, and in fact offered, to withdraw its claims relating to the Glover Smelter, West Fork and Sweetwater sub-sites, and thus conducted no discovery to the extent it was allowed under the MCMO and has no information as to Union Pacific liability at those sub-sites. *See* Exhibits 2 and 3 to Evans Decl.

57. Mr. Hawkins testified that he was not aware of an active Union Pacific rail line that is contiguous to a SEMO site. Ex. 14, Hawkins Dep., at 45:7- 9 (Mar. 6, 2014).

**Response:** Disputed to the extent that Asarco has no information concerning Union Pacific's liability at those sub-sites since it intended, and in fact offered, to withdraw its claims relating to the Glover Smelter, West Fork and Sweetwater sub-sites, and thus conducted no discovery to the extent it was allowed under the MCMO and has no information as to Union Pacific liability at those sub-sites. *See Exhibits 2 and 3 to Evans Decl.*

58. Mr. Hawkins also testified that he researched "Union Pacific, Missouri Pacific, Mississippi River Bonne Terre, Missouri Illinois, Illinois Southern, and St. Louis Iron Mountain [& Southern] Lines with respect to historic operations," and none of the abandoned rail lines that he researched ran through a SEMO site. Ex. 14, Hawkins Dep., at 46: 12-19, 48:22-49:3.

**Response:** Disputed to the extent that Asarco has no information concerning Union Pacific's liability at those sub-sites since it intended, and in fact offered, to withdraw its claims relating to the Glover Smelter, West Fork and Sweetwater sub-sites, and thus conducted no discovery to the extent it was allowed under the MCMO and has no information as to Union Pacific liability at those sub-sites. *See Exhibits 2 and 3 to Evans Decl.*

59. Mr. Robbins also testified that he did not know whether Union Pacific ever serviced the Glover Smelter. Ex. 12, Robbins Dep., at 38:23-25.

**Response:** Disputed to the extent that Union Pacific deliberately omits that Asarco intended, and in fact offered, to withdraw its claims for sub-sites located in Reynolds or Iron Counties. *See Exhibits 2 and 3 to Evans Decl.*

60. Mr. Robbins stated that he was not aware that Asarco ever spent any money addressing remediation of contaminants in a railroad right-of-way in the vicinity of the Glover Smelter, or at West Fork or Sweetwater. Ex. 12, Robbins Dep., at 39:7-11 (Glover Smelter), 34:22-35:5 (West Fork and Sweetwater).

**Response:** Disputed to the extent that Union Pacific deliberately omits that Asarco intended, and in fact of offered, to withdraw its claims for sub-sites located in Reynolds or Iron Counties. *See* Exhibits 2 and 3 to Evans Decl.

61. Mr. Robbins said he was not aware that the EPA or State of Missouri ever spent any response costs addressing contamination on any railroad rights-of-way in the vicinity of the Glover Smelter or in the area of West Fork and Sweetwater. Ex. 12, Robbins Dep., at 39:12-16 (Glover Smelter), 35:12-16 (West Fork and Sweetwater).

**Response:** Disputed to the extent that Union Pacific deliberately omits that Asarco intended, and in fact of offered, to withdraw its claims for sub-sites located in Reynolds or Iron Counties. *See* Exhibits 2 and 3 to Evans Decl.

62. Asarco's expert witness, Paul V. Rosasco, did not address West Fork Mine, Sweetwater Mine, or Glover Smelter in his expert report. Ex. 15, Rosasco Dep., at 59:8-11 (Feb. 27, 2014).

**Response:** Disputed to the extent that Union Pacific deliberately omits that Asarco intended, and in fact of offered, to withdraw its claims for sub-sites located in Reynolds or Iron Counties. *See* Exhibits 2 and 3 to Evans Decl.

63. In his deposition, Mr. Rosasco agreed that the SEMO Settlement included the West Fork, Sweetwater, and Glover Smelter sub-sites. Ex. 15, Rosasco Dep., at 62:15-20.

**Response:** Disputed to the extent that Union Pacific deliberately omits that Asarco intended, and in fact offered, to withdraw its claims for sub-sites located in Reynolds or Iron Counties. *See* Exhibits 2 and 3 to Evans Decl.

64. Mr. Rosasco stated that he did not determine whether Union Pacific or any predecessors to Union Pacific owned or operated railroads at West Fork Mine, Sweetwater Mine, or Glover Smelter. Ex. 15, Rosasco Dep., at 88:12-18.

**Response:** Disputed to the extent that Union Pacific deliberately omits that Asarco intended, and in fact offered, to withdraw its claims for sub-sites located in Reynolds or Iron Counties. *See* Exhibits 2 and 3 to Evans Decl.

65. Mr. Rosasco testified that he was not aware of any location where Asarco funds were being used to remediate a Union Pacific right-of-way or to remediate any location attributable to a Union Pacific right-of-way. Ex. 15, Rosasco Dep., at 210:21-212:5.

**Response:** Disputed to the extent that Union Pacific deliberately omits that Asarco intended, and in fact offered, to withdraw its claims for sub-sites located in Reynolds or Iron Counties. *See* Exhibits 2 and 3 to Evans Decl.

66. Mr. Rosasco testified that he did not have any opinions regarding West Fork Mine, Sweetwater Mine, or Glover Smelter. Ex. 15, Rosasco Dep., at 60:8-11.

**Response:** Disputed to the extent that Union Pacific deliberately omits that Asarco intended, and in fact offered, to withdraw its claims for sub-sites located in Reynolds or Iron Counties. *See* Exhibits 2 and 3 to Evans Decl.

67. Mr. Pfahl testified that he agreed with the Rosasco report, which offered no opinion regarding Union Pacific's liability for West Fork, Sweetwater, and Glover Smelter. Mr. Pfahl stated that he had no contrary information. Ex. 10, Pfahl Dep., at 117:11-19.

**Response:** Disputed to the extent that Union Pacific deliberately omits that Asarco intended, and in fact offered, to withdraw its claims for sub-sites located in Reynolds or Iron Counties. *See* Exhibits 2 and 3 to Evans Decl.

68. Mr. Pfahl stated that he was not aware of any releases of hazardous substances from the Sweetwater Mine. Ex. 10, Pfahl Dep., at 155:15-20.

**Response:** Disputed to the extent that Union Pacific deliberately omits that Asarco intended, and in fact offered, to withdraw its claims for sub-sites located in Reynolds or Iron Counties. *See* Exhibits 2 and 3 to Evans Decl.

69. Mr. Pfahl stated that since the SEMO Settlement, he was not aware of Asarco spending any money on environmental remediation at West Fork, Sweetwater, or the Glover Smelter. Ex. 10, Pfahl Dep., at 39:24-40:6.

**Response:** Disputed to the extent that Union Pacific deliberately omits that Asarco intended, and in fact offered, to withdraw its claims for sub-sites located in Reynolds or Iron Counties. *See* Exhibits 2 and 3 to Evans Decl.

**Asarco's Additional Facts in Opposition to Union Pacific's Motion**

Asarco's Bankruptcy

1. The bankruptcy court approved Asarco's plan of reorganization (the "Plan") on November 13, 2009. Memorandum Opinion, Order of Confirmation, and Injunction, *In re Asarco LLC, et al* at 70 (November 2009) (attached as "Exhibit D").

2. Parties could not make payments on the SEMO claim until the Plan became effective and was confirmed by the Texas Court (and rejected other competing plans of reorganization). Evans Decl. ¶ 3

3. The Plan became effective on December 9, 2009 (the "Effective Date"). Notice of the Effective Date of the Seventh Amended Plan of Reorganization, *In re Asarco LLC, et al* at 70 (December 2009) (attached as "Exhibit E"). Until a plan of reorganization was finally effective, the Debtor's actual liability could have been any amount less than or equal to \$1.5 million, including zero, which the Bankruptcy Court expressly recognized could mean that the Debtor's CERCLA liability would never have been "resolved."

4. The Plan and Confirmation Order required Asarco to pay, among other claims, the SEMO claim, in full with accrued interest on the Effective Date. Exhibit A at 8.

5. When the reorganization was concluded, Asarco paid all claims in full, with interest. JP Morgan Chase Commercial Checking Account Statement (December 2009) (attached as "Exhibit G").

6. The environmental claims advanced against Asarco in the bankruptcy, including the SEMO claim, were advanced and satisfied on a joint and several liability basis. Proofs of Claim were filed by the United States (Numbers 10745 and 10746), the Missouri Department of

Natural Resources (Numbers 11116 through 11169), The Doe Run Company (Number 10539) and DR Land Holdings LLC (number 10540) (July 2006) (attached as “Exhibit H”).

7. The United States Department of Justice provided statements complimenting Asarco for satisfying these claims in full. As one official noted during EPA’s Washington, DC press conference on the Asarco bankruptcy, “[this shows that just because a company goes into bankruptcy it will not avoid its environmental liability.] Another U.S. official stated, “[taxpayers got more than a dollar for every ...]”. Kaufman, Leslie, *Asarco Pay \$1.79 Billion to Fix Sites*, New York Times (December 2009) (attached as “Exhibit I”).

8. Asarco and the United States included a provision in its SEMO joint and several liability settlement agreement that third-party claims would be preserved. Ex. 2 to UP’s SUMF at 13 (Doc. 221-2 at 14).

9. Asarco included language in all appropriate reorganization documents and disclosures that it preserved and would pursue responsible third parties that did not contribute to the massive SEMO settlement. Ex. 2 to UP’s SUMF at 13 (Doc. 221-2 at 14).

10. On May 13, 2011, Law 360 published an article, stating “Asarco LLC sued BNSF Railway Co. and four others in Missouri on Thursday, seeking contributions toward an \$80 million cleanup at a mining site the company has fully covered as part of its bankruptcy reorganization.” The article additionally attached a copy of the complaint. Grande, Allison, *Asarco Sues BNSF Over \$80M Cleanup*, Law360 (May 2011) (attached as “Exhibit J”).

#### Asarco’s Efforts to Discern Union Pacific’s Involvement at SEMO

11. As of the filing of the Complaint (Doc. 1) on May 12, 2011, Asarco did not possess sufficient information to name Union Pacific as a defendant from which Asarco is entitled to contribution under CERCLA at the SEMO site. Evans Decl. ¶ 4.

12. During the period between May and September 2011 Asarco actively sought to determine the nature and extent of Union Pacific's ownership, operation and activities that may have contributed to the heavy metals pollution found within the at Southeast Missouri Superfund Site. Evans Decl. ¶ 5.

13. The NewFields' Report, prepared under the direction of the EPA, identifies areas of contamination within SEMO – including in St. Francois County – where abandoned railroads are located. These areas of abandoned railroads contribute to the negative environmental impacts in SEMO. Ex. 11 to UP's SUMF at Figure 2; Evans Decl. ¶ 5.

14. The 2007 NewField's Report is a *draft* and does not identify or otherwise state anything regarding the ownership of the offending railroad. The NewField's Report does not identify Union Pacific in any manner whatsoever. It does not indicate that Union Pacific owned, owns or abandoned the polluted railroads in SEMO. Its section on Railroad History stops in 1972 without mentioning Union Pacific's acquisition of any of the rail lines it details. *See generally*, Ex. 11 to UP's SUMF.

15. In an effort to identify the owner or operator of the abandoned rail lines, Asarco consulted with and retained both an environmental search firm specializing in the identification of PRPs and an environmental engineering firm tasked with determining the identity of the railroad that operated and abandoned the railroad lines. Evans Decl. ¶ 6.

16. Asarco performed additional due diligence by studying all available public records of railroad right-of-way contamination as it pertains to Union Pacific. During the period between May and September 2011, Asarco also researched why EPA had not pursued a claim against SEMO. In a letter dated September 21, 2012, Asarco notified the United States

Environmental Protection Agency of Union Pacific's practices and urged the agency to take action. Exhibit 4 to Evans Decl.; Evans Decl. ¶ 7.

17. Information concerning Union Pacific's operations and ownership of polluting, abandoning rail lines was not available to Asarco prior to May 2011 because Union Pacific failed to make all necessary filings sufficient to place the government and the public on notice of its abandonment of acquired railroad lines in SEMO. Evans Decl. ¶ 8.

18. A series of corporate successions and transactions that generated a convoluted history of ownership also worked to conceal Union Pacific's ownership and operations of the abandoned railroads within SEMO. Evans Decl. ¶ 8.

19. During discussions with BNSF in May 2011, Asarco learned that Union Pacific was deeply involved in the ownership and abandonment of contaminated rail lines in SEMO, and that Union Pacific's ownership could only be confirmed through an unraveling of documents that railroads are required to file with the United States Interstate Commerce Commission ("ICC"), and later the United States Surface Transportation Board ("STB"). Evans Decl. ¶ 9.

20. Asarco also learned during discussions with BNSF, that Union Pacific may have concealed its ownership, operations and control of the abandoned rail lines in SEMO through various corporate purchases, sales and a variety of company succession tactics. Evans Decl. ¶ 9.

21. Immediately upon receiving this information, and because Asarco could not ascertain Union Pacific's ownership and abandonment through a diligent search of public records such as title reports, public database searches, EPA records, Freedom of Information Act requests, Asarco enlisted the assistance of consultants, including the former Secretary to the Interstate Commerce Commission, Hon. Sidney L. Strickland. Evans Decl. ¶ 10.

22. After an investigation of ICC records and further research by Asarco, sufficient information emerged by September 2011 linking Union Pacific to the polluted rail lines in SEMO and rendering it responsible under CERCLA. At that time, Asarco added Union Pacific as a defendant in this action under Federal Rule of Civil Procedure, Rule 15(a). Evans Decl. ¶ 11.

23. Secretary Strickland determined, based on his experience and his research of ICC records in the National Archive and records at the Surface Transportation Board, that Union Pacific failed to make all of the necessary filings required under United States law that would have allowed any interested party to readily identify Union Pacific as the owner of the abandoned rail lines in SEMO. Evans Decl. ¶ 12.

24. Asarco and Union Pacific were engaged in preliminary settlement discussions related to SEMO prior to the time Asarco added the railroad as a defendant in this action. Asarco sent a letter to Union Pacific's counsel on July 20, 2011 to identify all the sites in which Asarco had contribution claims under CERCLA, including SEMO. The letter also noted that litigation was already pending at some of these sites against other parties and requested the scheduling of a mediation within 90 days in order to avoid adding Union Pacific to existing litigation. Evans Decl. ¶ 13; Exhibit 1 to Evans Decl.

25. Union Pacific countered with threats against Asarco should it commence an action. Asarco continued its investigation culminating in the information that supported its decision to add Union Pacific as a defendant in September of 2011. Union Pacific has repeatedly attempted to intimidate and threaten Asarco and Integer in an effort to avoid abandoned railroad pollution litigation. Evans Decl. ¶ 14.

26. Asarco promptly filed its First Amended Complaint (Doc. 9) asserting a CERCLA contribution claim against Union Pacific on September 14, 2011 once it obtained preliminary, reliable proof of Union Pacific's ownership and abandonment of polluting railroads in SEMO. Evans Decl. ¶ 15.

27. On June 18, 2014, Asarco sent correspondence to Union Pacific's counsel offering to withdraw its claims for West Fork, Sweetwater and Glover sub-sites in SEMO by properly filing an amended complaint. Evans Decl. ¶ 16; Exhibit 2 to Evans Decl.

28. Union Pacific would not agree to a dismissal that would satisfy the requirements of the Federal Rules of Civil Procedure, Rule 15. Evans Decl. ¶ 17; Exhibit 3 to Evans Decl.

29. After Asarco's bankruptcy proceedings concluded in 2009, Sidney L. Strickland, Jr. ("Mr. Strickland") assisted Asarco in researching Union Pacific's abandonment and concealment practices as to its ownership and operation of rail lines throughout the country. Declaration of Sidney L. Strickland ("Strickland Decl.") ¶ 4.

30. As to the rail lines in SEMO, Mr. Strickland researched Union Pacific's ownership and operation of rights of way, including its abandonment of those lines. This included review of Union Pacific's ICC filings at the National Archive. Strickland Decl. ¶ 5.

31. Mr. Strickland spent over 100 hours researching Union Pacific's filings as to its rail lines throughout the country. Strickland Decl. ¶ 6

32. Based upon Mr. Strickland's experience with the ICC, including as its Secretary for four years, Union Pacific did not comply with regulatory guidelines for filings relating to its ownership and abandonment of rail lines in SEMO. Union Pacific did not make all of the necessary filing such that it could be readily be determined whether Union Pacific owned and abandoned the rail lines at issue in SEMO. Strickland Decl. ¶ 7.

Asarco Was Not Entitled To Discovery on Affirmative Defenses

33. On September 26, 2013, Asarco served its Notice of Deposition of Union Pacific Pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, requesting the railroad's person most knowledgeable on a number of Union Pacific's affirmative defenses. Declaration of Laura Brys ("Brys Decl.") ¶ 3.

34. On September 30, 2013, the parties conducted a telephonic meet and confer on the Notices of Deposition that Asarco had sent, wherein the Defendants—including Union Pacific—stated that it was their position that Asarco was not entitled to discovery on affirmative defenses, which was stayed under the MCMO. Brys Decl. ¶ 4.

35. On October 4, 2013, Asarco agreed to withdraw its deposition topics relating to Defendants' affirmative defenses based on Asarco's understanding of the Court's MCMO. Exhibit 1 to Brys Decl.; Brys Decl. ¶ 5.

36. Asarco has been unable to serve any written discovery at all, or conduct depositions on Defendants' affirmative defenses, including Union Pacific's statute of limitations affirmative defense at issue in the summary judgment motion. Brys Decl. ¶ 6.

37. In Phase II of Discovery, Asarco intends to propound interrogatories, requests for production and requests for admission and take further depositions to ascertain when Union Pacific first knew—or should have known—about Asarco's contribution claim. Brys Decl. ¶ 7.

38. Union Pacific's knowledge as to when it first learned of Asarco's CERCLA contribution claim is solely within the possession of Union Pacific's counsel, officers and employees. Brys Decl. ¶ 8.

The Actual Testimony of Asarco's Witnesses

39. Mr. Pfahl had little to no contact with SEMO, having only actually visited the site once in his tenure at Asarco. Exhibit B at 17:15-18:18 and 42:10-18. He provides testimony regarding railroads in general, and attributes his findings and experience at other sites to Union Pacific's railroads at SEMO. Exhibit B at 69:8-17.

40. Mr. Pfahl only reviewed the NewFields report, sampling data (from 2012 and 2013), and Asarco's expert report in this action (from 2014) as related to Asarco's evaluation and assessment of Union Pacific's liability at the SEMO sites. Exhibit B at 49:6-50:2 and 65:20-66:12.

41. Mr. Pfahl is not aware of other data available to Asarco pertaining to Union Pacific's liability at the SEMO site. Exhibit B at 66:13-67:2 and 79:5-17. Nor is he aware of any audit materials or reports identifying Union Pacific as being potentially liable, and in fact had stated, "I doubt that such document exists." Exhibit B at 79:18-23.

42. The only information Asarco has regarding historic industrial rail line operations in SEMO is from Newfields and the expert Asarco retained for this litigation, Paul V. Rosasco, P.E. Exhibit B at 83:2-9.

43. While the NewFields report was available in 2007, nothing in the report attributes the railroads to any specific owner. Exhibit B at 101:5-7; *see generally*, Ex. 11 to UP's SUMF.

44. Contrary to Union Pacific's misstatements (or deliberate omissions) of Pfahl's testimony, Pfahl admits that the SEMO sites are different. Exhibit B at 70:12-20.

45. Mr. Pfahl was unaware of Union Pacific's railroad ownership at the SEMO sites until Asarco initiated litigation. Exhibit B at 73:2-13. When asked if Asarco made a determination that Union Pacific had liability at SEMO, Pfahl replied that Asarco indeed made

that determination and his knowledge of that was “just based on my observation, we sued you.”

Exhibit B at 73:2-13.

46. The decision to initiate litigation is made by Asarco’s general counsel and outside counsel. Asarco’s outside counsel has provided a declaration, filed concurrently with this Opposition, that the information as to the identity of the proper defendant regarding rail line contamination was not available until *after* the lawsuit was instituted in May 2011. Evans Decl. ¶ 4; Exhibit B at 74:17-18.

47. As of the SEMO Settlement and presentation of that settlement to the Bankruptcy Court for approval, Asarco did not have information as to which other third-parties were liable at the SEMO site. Exhibit B at 125:6-12. Asarco was not investigating third-parties at the time Exhibit B at 125:21-22 and was only dealing with parties who had filed proofs of claim. Exhibit B at 124:3-10.

48. In the bankruptcy, Asarco reserved its rights to contribution from third-parties and solely commenced to research the liability of other parties after the bankruptcy was finalized in 2011. Exhibit B at 126:2-6.

49. There were many rail lines identified at the SEMO site that have been abandoned for many years, and Asarco was not aware of their owners until they hired expert Rosasco to analyze. Exhibit B at 140:1-8.

Dated August 11, 2014

Respectfully submitted,

By: /s/ Gregory Evans

Gregory Evans, *Admitted Pro Hac Vice*  
Laura G. Brys, *Admitted Pro Hac Vice*  
Daphne Hsu, *Admitted Pro Hac Vice*  
Integer Law Corporation

811 West Seventh Street, Twelfth Floor  
Los Angeles, California 90017  
Telephone: (213) 627-2268  
Facsimile: (213) 627-2579  
E-Mail: [gevans@integerlegal.com](mailto:gevans@integerlegal.com)  
E-Mail: [lbrys@integerlegal.com](mailto:lbrys@integerlegal.com)  
E-Mail: [dhsu@integerlegal.com](mailto:dhsu@integerlegal.com)

W. James Foland (SBN 25022)  
Michael L. Belancio (SBN 50115)  
Foland, Wickens, Eisfelder, Roper & Hofer, PC  
911 Main Street, 30th Floor, Commerce Tower  
Kansas City, Missouri 64105  
Telephone: (816) 472-7474  
Facsimile: (816) 472-6262  
E-Mail: [jfoland@fwpclaw.com](mailto:jfoland@fwpclaw.com)  
E-Mail: [mbelancio@fwpclaw.com](mailto:mbelancio@fwpclaw.com)  
**ATTORNEYS FOR ASARCO LLC**

**CERTIFICATE OF SERVICE**

I certify that counsel of record who are deemed to have consented to electronic service are being served on August 11, 2014, with a copy of this document via the Court's CM/ECF system pursuant to Local Rule 5.1.

/s/ Gregory Evans